

Montana State Library

This cover sheet created by Internet Archive for formatting.

328.3
L13 rac
1990

STATE DOCUMENTS COLLECTION

JAN 3 1991

MONTANA STATE LIBRARY
1515 E. 6th AVE.
HELENA, MONTANA 59620

ADMINISTRATIVE CODE COMMITTEE

A Report to the 52nd Legislature

PLEASE RETURN

December 1990



Prepared by

Montana Legislative Council

Montana Legislative Council
State Capitol, Room 138
Helena, Montana 59620
(406) 444-3064

Montana State Library



3 0864 1004 4175 0

ADMINISTRATIVE CODE COMMITTEE

A Report to the 52nd Legislature

December 1990

Prepared by John MacMaster, Staff Attorney

Montana Legislative Council

Room 138, State Capitol

Helena, MT 59620

MEMBERSHIP:
ADMINISTRATIVE CODE COMMITTEE

**Representative Dorothy Cody,
Chairman**

**Senator Gene Thayer,
Vice Chairman**

Representative Mary Lou Peterson

Senator Loren Jenkins

Representative R. Budd Gould

Senator Bob Williams

Representative Carolyn M. Squires

Senator Eleanor L. Vaughn

John MacMaster, Staff Attorney

Published by:
Montana Legislative Council

Robert B. Person, Executive Director
Gregory J. Petesch, Legal Services Director
David D. Bohyer, Research Director

TABLE OF CONTENTS

PART I -- THE HISTORY, FUNCTION, AND ACTIVITIES OF THE ADMINISTRATIVE CODE COMMITTEE	1
PART II -- THE NEED FOR THE MONTANA ADMINISTRATIVE PROCEDURE ACT AND LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE RULEMAKING	5
PART III -- THE REVIEW OF AGENCY RULES	9
APPENDIX A -- MEMORANDUM ON COMMITTEE'S POWERS	
APPENDIX B -- ADMINISTRATIVE RULES - MAPA REQUIREMENTS (Outline of an ACC Staff Mini-seminar)	
APPENDIX C -- PROPOSED LEGISLATION (REPEAL OF RULE MANDATING PROGRAMS FOR GIFTED AND TALENTED CHILDREN)	

PART I

THE HISTORY, FUNCTION, AND ACTIVITIES OF THE ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee, a permanent joint committee of the Montana Legislature, was established in 1975 by Title 5, chapter 14, part 1, MCA. The Committee consists of four members from the House and four members from the Senate. These members are appointed in the same manner as are standing committees of their respective houses of the Legislature. The chairman of the Administrative Code Committee is selected by the Committee members. During the biennium covered by this report, the staff of the Committee consisted of one staff attorney, employed by the Legislative Council, who devoted approximately one-fifth of his time to Committee business. Six other staff members of the Council Legal Division also provided services to the Committee on a part-time basis, reviewing rules of administrative agencies. A Council secretary performed clerical tasks for the Committee. Committee meetings were held as often as necessary.

The purpose of the Committee, as reflected in the statutes defining its powers and duties, is to review rules proposed and adopted by administrative agencies and filed with the Office of the Secretary of State under the provisions of the Montana Administrative Procedure Act (MAPA) and to generally oversee compliance with the requirements of MAPA. Although this authority includes the ability to oversee compliance with those parts of Title 2, chapter 4, MCA, concerning contested case procedure and judicial review of contested cases, the largest amount of the Committee's time during the biennium has been devoted to aspects of the rulemaking process itself. The Committee believes this emphasis is appropriate;

contested case procedures are somewhat beyond the authority of the Committee (with the exception of recommended amendments to statutes). Therefore, the Committee intends to serve: (1) as a body that provides routine review of executive agency rules; and (2) as a forum to which persons with complaints concerning Executive Branch rules and executive agency action founded on those rules may turn for less expensive and more timely solutions than court challenges to agency authority. For this reason, the Committee has sought to publicize its functions in the Montana Administrative Register (MAR), in rulemaking hearings, and in other forums.

It cannot be emphasized too strongly that MAPA does not grant substantive rulemaking authority to any agency. See 2-4-301, MCA.

Since publication of the Committee's Report to the 51st Legislature in December of 1988, the Committee has held four meetings to review rule proposal and adoption notices published in the MAR, consider problems with the application of rules, hear testimony, and study specific topics. A schedule of Committee meetings and a summary of the matters discussed follow:

June 19, 1989, Meeting

Organizational meeting; elected the Chairman and Vice Chairman; voted to request the Board of Public Education to reconsider its adoption of ARM 10.55.804, mandating in each public school a program for gifted and talented children.

December 15, 1989, Meeting

Voted to take no action on the statutory 20-cent salary increase for nursing home nurses aides because the Department of Social and

Rehabilitation Services, which had indicated earlier that it would not give the full 20-cent increase, promised the Committee that the full increase would be given; voted to have the Committee's objection to the mandatory gifted and talented children program rule of the Board of Public Education published in the ARM immediately following the rule and voted to instruct staff to draft a bill repealing the rule; voted to instruct staff to write the Joint Select Committee on Workers' Compensation and request the Select Committee to draft a bill requiring the State Compensation Mutual Insurance Fund to adopt rules under MAPA that set forth the process, factors, and formula or formulas by which classifications and rates are adopted and changed; voted to take no action on a Building Codes Bureau rule requiring a permit to reroof or re-side a house; voted to instruct staff to write the Board of Nursing and suggest that a proposed increase in the nurses' registration fee is inappropriate until the Board draws down its surplus to an amount equal to the anticipated expenditures of the next 6 months; voted to take no action on Department of Justice gambling rules but to monitor the rules and consider action at a later meeting.

May 24, 1990, Meeting

Short informational meeting on various topics of ongoing interest to the Committee, held during the May 1990 Special Session of the Legislature; no executive action taken.

June 29, 1990, Meeting

Voted to instruct staff to answer a letter to the Committee by informing the letter writer that his request (that the Committee consider whether certain OPI rules conflict with statutes) had been complied with and that the Committee found no conflict; voted to introduce a Committee bill that strengthens and adds to the requirements of 2-4-110, MCA; voted to take no action on

Department of Justice gambling rules; voted to instruct staff to write the Fire Marshal and thank him for agreeing with the Committee that Fire Marshal prerequisites for the sale of above-ground fuel storage tanks must be imposed by rule, not letters to tank builders; voted to instruct staff to write the Department of Social and Rehabilitation Services and object to its adoption of numerous recent retroactive rules and inform the Department that the Committee will automatically place any further retroactive rule on the agenda of the next Committee meeting following such adoption; voted to take no action on Office of Public Instruction rules implementing the laws on school funding equalization aid.

* * * * *

At its May 24 and June 29, 1990, meetings, the Committee noted the relatively large increase in emergency rules and retroactive rules this legislative interim. Some Committee members expressed serious concern and a desire to take action to either prohibit or drastically limit such types of rules. The consensus of the Committee was to take no action this interim but monitor such rules and consider action in the future if the proliferation of such rules continues. The Committee's main concern was that the agencies adopting emergency rules gave insufficient and sometimes totally inadequate reasons for the rules and that the agencies adopting retroactive rules gave insufficient and sometimes totally inadequate reasons for making the rules retroactive. With respect to both types of rules, the reason was all too often that the agency knew that the rules were necessary but neglected to adopt the rules in time, making it necessary to either adopt them as emergency rules or make them retroactive.

PART II

THE NEED FOR THE MONTANA ADMINISTRATIVE PROCEDURE ACT AND LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE RULEMAKING

In Montana, as in most states, the state constitution provides that lawmaking is a function of the Legislature and declares that certain procedures must be used in order to enact laws.¹ Historically, it is also a recognized principle of state law that the Legislature may delegate the power to enact rules to the Executive Branch, composed of agencies that are themselves usually created by the Legislature.² This delegation of legislative authority to enact rules that are binding as law has its support not only in law but also in reason; the Legislature, being a part-time body and lacking expertise in the many varied purposes of state government, does not have the time, knowledge, and resources to adopt as statutory law the many detailed provisions needed to implement the statutes the Legislature enacts. To facilitate the administration of legislation, the Legislature authorizes rules that must be adopted pursuant to the requirements of MAPA.

Because of the MAPA definition of "agency", MAPA applies to most state agencies.³ By its application, MAPA has standardized many functions of administrative agencies, the most important of which may be the rulemaking function delegated by the Legislature. As a result, persons dealing with state agencies need not obtain rulemaking information and copies of agency rules solely from the agencies themselves, nor must they distinguish between many different forms and styles of agency regulations. Furthermore, there is no longer a risk that an agency may have adopted rules in a manner unknown and undiscoverable by the general public. Under MAPA: (1) all proposed and adopted rules of every agency covered by MAPA must be printed

in the Montana Administrative Register, which is published twice monthly by the Secretary of State; (2) interested persons must be given an opportunity to comment on proposed rules; and (3) adopted rules must be published in the Administrative Rules of Montana. Much good has resulted from these and other provisions of MAPA. The purpose and effect of MAPA, however, have sometimes been misconstrued. As the Administrative Code Committee noted in an earlier report to the Legislature,⁴ MAPA itself has sometimes been blamed for the proliferation of agency rules and its repeal has sometimes been advocated as the cure to prevent the adoption of those rules. But as the Committee also noted in that report,⁵ MAPA does not grant rulemaking authority to state agencies, as the language of MAPA plainly states.⁶ Rulemaking authority has instead been granted by the Legislature in individual sections of the law scattered throughout the Montana Code Annotated. A typical grant of rulemaking authority, 37-32-201, MCA, states, with respect to the Board of Cosmetologists:

37-32-201. Rulemaking power. (1) The board may adopt rules in accordance with the Montana Administrative Procedure Act to implement this chapter and to properly regulate this profession.

The number of statutory grants of rulemaking authority may surprise some people. Fourteen years ago, the Committee report listed almost 350 statutory sections delegating authority for agencies to adopt administrative rules and noted that the total number of statutory sections granting rulemaking authority was probably even higher.⁷ As the 1976 Committee report also found, the statutory grants of rulemaking authority are often worded in a manner that provides little detail and guidance to executive agencies on the way in which rulemaking authority is to be exercised.⁸ While a matter for concern,

it is worth noting that statutory rulemaking grants must of necessity continue to be enacted. To address the problem of loosely worded and hastily considered delegations of rulemaking authority, the 1976 Committee report recommended and the 45th Legislature enacted a law requiring the Legislature to provide in its joint rules a procedure for the adoption of a statement of legislative intent whenever rulemaking authority is delegated.⁹ Chapter 70 of the Joint Rules of the Legislature (1989) and the resulting statements of legislative intent have been successfully used by the Committee and its staff in guiding the agency rulemaking process. (Of course, the Joint Rules may be amended during the 1991 Legislative Session.)

Since its creation in 1975, the Committee has sponsored other legislation to help strengthen the Legislature's influence over the rulemaking process.

Statements of legislative intent, hearings on agency rules, and similar "mechanical" devices, while certainly helpful, cannot be relied upon in all instances to ensure a legal implementation of legislative intent by the agency, much less the "best", most practical, or least expensive implementation. Whether because of oversight, inaccurate use of language, limited time allowed for legislative or committee action, or simple inability to foresee possible legal or economic consequences, it is almost impossible as a practical matter to frame grants of rulemaking authority and the statutes implemented by them in a manner acceptable to all interests. Hindsight must therefore be used, and legislative oversight becomes a practical necessity.

PART III

THE REVIEW OF AGENCY RULES

The Administrative Code Committee is required by 2-4-402, MCA, to "review all proposed rules filed with the secretary of state". The review of rules by the Committee is conducted primarily to determine compliance with statutory requisites for valid rules. Under 2-4-305, MCA, a rule is not effective unless all of the following conditions are met:

- (1) Each substantive rule adopted must be within the scope of authority conferred by the Legislature and in accordance with other statutory standards.
- (2) The rule must be consistent with the implemented statute and must be reasonably necessary to carry out the purpose of the statute.
- (3) The rule must substantially comply with the requirements of the law relating to the procedure for adoption (e.g., notice, hearing, and submission of comments on the rule).

To determine whether a rule complies with these statutory standards, the Committee reviews the statute authorizing rulemaking, the substantive law implemented by the rule, and the procedure used by the agency to propose or adopt the rule. The Committee reviews the rule for such additional considerations as clarity and economic impact.

The review begins with a staff attorney analyzing the rule for substantive and procedural compliance with the statutes. If an error or problem in any proposed or adopted rule is discovered, the reviewing attorney notifies the agency concerned and recommends a solution. If the agency agrees with the staff comments and agrees to implement the proposed remedy, the staff comments and recommendation and the agency response are noted in a written summary of current rules that is distributed to the Committee. The staff attorney conducts a followup as necessary to determine subsequent agency compliance. If the agency disagrees with the staff comments and recommendation and the staff comments and recommendation are of a substantive nature, the problem is explained in the attorney's summary and, if it is an important problem, orally before the Committee at its next meeting. The agency is given an opportunity to present its views at the meeting. The Committee then may act on the matter by vote or Committee consensus.

If the agency was not represented at the meeting, it is notified of the Committee's recommendation, request, or objection. Followup is then conducted as necessary by the Committee staff to determine agency compliance.

Staff and Committee comments and recommendations generally fall into three major categories:

- (1) The agency may lack statutory authority for the proposed rule, the rule may improperly interpret the language of the statute being implemented, the rule may be unnecessary to give effect to the statute implemented, or the rule may not have been adopted in

substantial compliance with the procedural requirements of the Montana Administrative Procedure Act.

- (2) The rule may improperly cite the authorizing statute or the statute implemented (although both types of statutes may in fact exist), improperly repeat statutory language, or contain ambiguous language. Comments and recommendations of this type are brought to the Committee's attention if the agency disagrees with the comments and recommendations of the staff, depending upon the severity of the violation and the nature of the agency response.
- (3) The rule may contain grammatical, spelling, or typing errors, which are usually brought to the attention of the agency so that they may be corrected. They are rarely brought to the attention of the Committee.

In the great majority of cases in which comments and recommendations were made, the agencies responded positively and remedied the situation by: (1) canceling the rulemaking proceeding altogether; (2) canceling the rulemaking proceeding and rule objected to and renoticing the rule in a different form; (3) amending the proposed rule in the subsequent notice of adoption; or (4) correcting minor errors in the ARM replacement pages.

During the past biennium, the staff attorneys' combined time spent reviewing rules was approximately 20 hours each week.

END NOTES

1. Article V, §1, Montana Constitution; Article V, §11, Montana Constitution.

2. See, for example, Chicago, M & St. P. Ry Co. v. Bd. of RR Comm'rs., 76 Mont. 305, 247 P. 162 (1926).

3. Sections 2-3-102 and 2-4-102(2), MCA; certain exceptions exist, such as the Governor and the Board of Regents.

4. Report of the Administrative Code Committee to the 45th Montana Legislature (December 1976), p. 5.

5. Ibid., p. 7, which reads in part:

. . . the committee has noted a widespread misunderstanding that the APA [Montana Administrative Procedure Act] is the cause of rules. To clear up any confusion on this issue, the committee has proposed language from the California statutes declaring that the APA can never be used as authority to adopt a substantive rule, and that rule [sic] adopted under authority of another statute must be reasonably necessary to effectuate the purpose of that other statute.

6. Section 2-4-301, MCA, provides:

Except as provided in part 2 [which applies only to organizational and procedural rules], nothing in this chapter confers authority upon or augments the authority of any state agency to adopt, administer, or enforce any rule.

7. Report of the Administrative Code Committee to the 45th Montana Legislature (December 1976), pp. 5-7.

8. Ibid., p. 9.

9. Section 5-4-404, MCA.

APPENDIX A

MEMORANDUM ON COMMITTEE'S POWERS

ADMINISTRATIVE CODE COMMITTEE'S POWERS

Prepared for the Administrative Code Committee

By John MacMaster
Staff Attorney

Montana Legislative Council
October 1986

This legal memo was prepared at the request of Representative Gary Spaeth, Chairman of the Administrative Code Committee. It sets forth the various powers of the Committee under the Montana Administrative Procedure Act (MAPA). The Committee may:

- (1) review the incidence and conduct of administrative proceedings under MAPA; 2-4-402(3)(e), MCA;
- (2) review all proposed rules, though Department of Revenue proposals may only be reviewed for procedural compliance with MAPA; 2-4-402(1) and (2), MCA;
- (3) require an agency proposing a rule to hold a hearing on the rule; 2-4-402(3)(c), MCA;
- (4) submit oral and written testimony at an agency's rulemaking hearing; 2-4-402(3)(b), MCA;

- (5) require an agency to publish the full or partial text of rule material adopted and incorporated by reference to the material; 2-4-307(4), MCA;
- (6) obtain an agency's rulemaking records for the purpose of reviewing compliance with 2-4-305, MCA; 2-4-402(3)(a), MCA;
- (7) require an agency to prepare an economic impact statement regarding a rule proposal. As an alternative, the Committee may by contract prepare its own statement. Notice of the statement and of where a copy can be obtained is published in the Montana Administrative Register; 2-4-405, MCA;
- (8) petition an agency for the adoption, amendment, or repeal of a rule; 2-4-315, MCA;
- (9) make a written recommendation to an agency for the adoption, amendment, or repeal of a rule; 2-4-402(3)(b), MCA;
- (10) make a written objection to an agency regarding a proposed or adopted rule. The agency must respond in writing. If the Committee does not then withdraw or substantially modify its objection, the Committee may require publication of the objection next to the rule in both the Montana

Administrative Register and the Administrative
Rules of Montana; 2-4-404, MCA;

- (11) poll the Legislature to determine whether a proposed rule is consistent with the Legislature's intent; 2-4-403, MCA. See also 2-4-404, MCA;
- (12) make a recommendation to the Legislature regarding an agency's grant of rulemaking authority. For example, the Committee could recommend that the statute granting rulemaking authority be amended or repealed; 2-4-314, MCA;
- (13) petition an agency for a declaratory ruling on the applicability of an agency rule. The ruling is subject to judicial review, including review at the Committee's request; 2-4-501, MCA;
- (14) seek judicial review of an emergency rule; 2-4-303, MCA;
- (15) institute, intervene in, or otherwise participate in proceedings involving MAPA (including an action to change or repeal a rule) in the state and federal courts and administrative agencies; 2-4-402(3)(d), MCA;
- (16) require an agency to give the Committee copies of documents filed in a proceeding involving the interpretation of MAPA or an agency rule; 2-4-410, MCA; and

- (17) require an agency to review its rules biennially to determine if rules should be adopted, amended, or repealed; 2-4-314(1), MCA. That section requires each agency to do this. The Committee can use various powers set forth in this legal memo, paragraph (16) for example, to force an agency to carry out the review.

In addition to the above powers under MAPA, the Committee may remind an agency that the Legislature holds the power of the purse and may not look favorably upon an agency in the next regular session if the agency exceeds its rulemaking authority or plays fast and loose with either that authority or the legislative intent behind a statute. The Committee may also, under its inherent powers as a legislative committee, draft and introduce legislation relating to MAPA; an agency's grant of rulemaking authority; adoption, amendment, or repeal of a rule; or other matters relating to rulemaking.

APPENDIX B

ADMINISTRATIVE RULES -- MAPA REQUIREMENTS

(Outline of an ACC Staff Mini-seminar)

ADMINISTRATIVE RULES -- MAPA REQUIREMENTS

Outline for a Mini-seminar

(August 1990)

Prefatory remarks: Description of the Administrative Code Committee, its staff, and their functions. Clarification that rules are not reviewed by the Legislative Council--they are reviewed by Legislative Council attorneys assigned as staff attorneys to the ACC for rule review purposes.

Background reading

- Read, study, and periodically reread Title 2, ch. 4, parts 1 through 4, MCA, and the annotations to those parts.
- Chapters 2 and 3 of the Legislative Council's Bill Drafting Manual can be consulted on grammar, punctuation, capitalization, and other matters of style and English usage. Photocopies of these chapters can be distributed to those working with rules.
- The ACC staff memo, "Review of Administrative Rules", dated August 1990, outlines how the ACC's staff should review rule notices.
- Read and periodically reread the memo from David Niss to "Lawyers" regarding "Updated Procedure and Format Memo for Review of Administrative Rules", dated May 7, 1984. Use this memo as a reference source.

- Read the Attorney General's Model Rules, including the Appendix of Sample Forms. See Title 1 of the ARM.

Definition of administrative rule

See 2-4-102(10) and (11).

Legislative delegation of rulemaking authority

- The Legislature has the authority to delegate to the Executive Branch agencies the authority to adopt administrative rules that have the force and effect of law.
- The following are some reasons why a delegation of rulemaking authority may be necessary or desirable:
 - There is a lack of expertise in the Legislature.
 - The field of law involved may be too complex, too broad, or too narrow and obscure.
 - The administrative agency that will administer a statute and implement it by rules has an abundance of expertise or much more expertise than the Legislature. It is better that the agency adopt rules than that the Legislature attempt to completely cover the area by statute.
 - There is a need for ongoing compliance with federal laws that the state must follow or that the state is required to follow to obtain federal funds.
 - The field of law does not easily lend itself to regulation completely by statute.
 - The field of law is rapidly changing, and it must be

constantly updated. The Legislature does not meet often enough to keep pace.

- The legislative process may result in a bill that grants rulemaking authority because the Legislature did not have the time or inclination to completely flesh out a concept, or a Legislative compromise may result in a vague or incomplete law that must be fleshed out by rule.

MAPA -- no grant of authority for substantive rules

- See 2-4-301. Section 2-4-201 is authority only for the types of rules mentioned in that section. It does not grant authority for substantive rules. See 2-4-102(11) for definition of substantive rules.

Key sections for rulemakers

- Persons formulating, writing, and filing rule proposal and adoption notices should pay particular attention to 2-4-302, 2-4-303, and 2-4-305 through 2-4-307 and to the annotations to those sections.

Statutory authority for rules

- Under 2-4-305(3), each new rule or amendment of a rule must cite the MCA section that is authority for the rule. A rule cannot be adopted unless an MCA section clearly grants authority to adopt rules and the rules implement a particular MCA section or sections.

- The cited authority must grant authority to implement, by rule, the MCA section(s) the rule cites as implemented. That is, the authority section should say "shall (or may) adopt rules to implement this part (chapter) (title) or (sections____ through____)". In certain instances, the authority section might state specific subjects that may (or shall) be implemented by rule; in such cases the authority section is also the section implemented.

Implementation of MCA sections

- Each new rule or amendment of a rule must cite the section(s) of the MCA that the rule implements. A rule cannot be adopted unless it (properly and in fact) implements one or more MCA sections.
- "Implement" a section means to flesh it out, explain it, further or fulfill its purpose, make it work or work better, interpret it, carry it into effect, etc. The whole purpose of administrative rules is to do one or more of the above. A rule that is not in some such way connected to at least one MCA section is invalid. There cannot be a rule that has nothing to do with implementing statutory law.

Consistency with MCA -- conflicts

- Each rule must be consistent with, and not in conflict with, the MCA section(s) it implements and all other statutory and constitutional law, including applicable federal law. See

2-4-305(6)(a). A rule can never override a constitutional provision or a statute.

- A rule cannot add to what a statute already contains a provision or additional requirement not envisioned by the Legislature. See the following case notes in the annotations under 2-4-305: *McPhail v. Mont. Bd. of Psychologists*; *Bd. of Barbers v. Big Sky College of Barber-Styling*; *Michels v. Dept. of Social & Rehabilitation Services*; and *Bell v. St.*

Statements of reasonable necessity for rules

- Section 2-4-302(1) requires a rule proposal notice to include a rationale for the intended action. Under 2-4-305(6)(b), the proposal notice must contain a statement explaining why a new rule or a rule amendment is reasonably necessary to effectuate the purpose of the statute the rule implements.
- Reasonable necessity and rationale are similar, but the former includes the latter and is a stiffer test to meet. If you adequately show reasonable necessity, you have an adequate rationale.
- The rule must be necessary to implement the statute, and the necessity must be reasonable. State as explicitly and clearly as you can why the rule is needed. Do not be afraid to be lengthy. Do not merely state what the rule provides or does or covers. Start by asking yourself who wanted the rule and exactly why they wanted it, and you will usually be able to formulate the reason for the rule. However, the reason must be a reasonable one and a good one and must constitute necessity for the rule.

- You can state the reasonable necessity for each rule, have a number of statements, each covering two or more rules, or have one or more statements covering all the rules in general.

- The following are some examples of reasonable necessity:
 - The rule is mandated by the Legislature (the MCA section that grants authority to adopt rules says the agency "shall" adopt rules). A provision that the agency "may" adopt rules is not reasonable necessity for rules.
 - The rule is needed to conform our law to federal law or to receive federal funds.
 - The rule is needed to make our law uniform with that of other states.
 - Rules regulating mirrors on school buses are considered necessary because investigation shows that three recent school bus accidents were caused by faulty mirrors, improperly placed mirrors, not enough mirrors, or other problems with mirrors.
 - Rules are necessary to provide a procedure by which the public can apply for or receive something from the state government and to ensure due process in that procedure.
 - A rule needs to be amended to delete a conflict with a statute.
 - Fees must be changed to make them commensurate with costs, as required by statute.
 - The rule changes are needed to conform the rules to recent legislative enactments.
 - A majority of those affected by the rules agree that experience and studies by experts show that the rules are necessary to protect the public safety and welfare.

- Standards contained in the rules must be updated because they are obsolete or are no longer state-of-the-art.
- The rules are needed to ensure fair competition and reduce unfair trade practices that have frequently occurred.
- Documented instances of incompetent or substandard work show that rules are necessary to reduce such occurrences.

Subsections (1) and (2) of 2-4-305

- The requirements of these self-explanatory provisions are often overlooked. Be sure you comply with these provisions.

Adoptions by reference

- Adoptions by reference are covered in 2-4-307 and the Model Rules. Review that section and the Model Rules when you intend to adopt rules or standards by referring to the rules or standards in the adopting rule and stating that the rules or standards are adopted and incorporated by reference.
- A rule cannot adopt all future amendments to the rules or standards that are incorporated by reference. If you wish to adopt future amendments, you must do so specifically in a new rule amendment proposal notice that refers to the amendments adopted or to the amended version of the rules or standards that are incorporated by reference.

Time periods

- An adoption notice must be published in the MAR not less than 30 days or more than 6 months after the publication date of the proposal notice. See 2-4-302(2)(c) and (3), 2-4-305(7), and 2-4-306(4).
- You must give a least 20 days' notice of a hearing. The notice period begins on the date of publication of the notice in the MAR.
- You must allow at least 28 days from the date of publication of a proposal notice in the MAR for interested persons to submit written material.

APPENDIX C

**PROPOSED LEGISLATION
(REPEAL OF RULE MANDATING PROGRAMS FOR
GIFTED AND TALENTED CHILDREN)**

Proposed Legislation

LC0002

1 **** Bill No. ***

2 Introduced By *****

3 By Request of the Administrative Code Committee

4

5 A Bill for an Act entitled: "An act repealing an
6 administrative rule, adopted by the board of public
7 education, that requires each school to have a
8 gifted and talented children program; repealing
9 Rule 10.55.804, Administrative Rules of Montana;
10 and providing an effective date."

11

12 WHEREAS, the Legislature, not the Executive
13 Branch, is the lawmaking branch of the state
14 government under the Montana Constitution; and

15 WHEREAS, the Legislature may delegate its power
16 to pass laws to the Executive Branch, which may
17 then, within certain limits, adopt administrative
18 rules that have the force and effect of law; and

19 WHEREAS, a rule may not conflict with a statute
20 and is invalid if it does; and

21 WHEREAS, 20-7-902(1), MCA, provides that "a
22 school district may identify gifted and talented
23 children and devise programs to serve them" and
24 Rule 10.55.804, Administrative Rules of Montana,

Proposed Legislation

1 mandates a gifted and talented children program in
2 each school, thereby directly and clearly
3 conflicting with the statute; and

4 WHEREAS, the Legislature has made a gifted and
5 talented children program discretionary, at the
6 choice of each local school board.

7

8 Be it enacted by the Legislature of the State of
9 Montana:

10

11 NEW SECTION. Section 1. Repealer. Rule
12 10.55.804, Administrative Rules of Montana, is
13 repealed.

14

15 NEW SECTION. Section 2. Effective date.
16 [This act] is effective on July 1, 1991.

17

18

-END-

100 copies of this public document were published at an estimated cost of \$1.35 per copy, for a total cost of \$135.00 which includes \$135.00 for printing and \$.00 for distribution.